predicated upon Congress' desire to promote competition, new technologies and the rapid buildout of a national wireless communications infrastructure.[49]

The newly enacted Section 253 underscores and illuminates Congress' intent that all telecommunications services, including CMRS, be fully utilized, and free of any barriers created by the States. Specifically, Section 253(a) states, in relevant part, that:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[50]

In other words, State or local legal or regulatory practices cannot create entry barriers (directly or indirectly "prohibit or have the effect of prohibiting") for any telecommunications carrier or service. Section 253 also makes clear that any State or local regulations affecting telecommunications services must

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49 By permitting regulatory forbearance of Title II provisions, Congress intended "to establish a Federal regulatory framework to govern the offering of all commercial mobile services." See Conference Report at 490. See also 139 Cong. Rec. S7995-S7996 (daily ed. June 24, 1993). Congress incorporated by reference the findings of the House bill and the Senate Amendment into the Omnibus Budget Reconciliation Act of 1993. Section 4002(13) of the Senate Amendment finds that "because commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-à-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest." (emphasis added).

50 47 U.S.C. § 253(a).

be imposed on a nondiscriminatory basis.[51] Subsections (b) and (c), which preserve the States' authority to regulate for universal service concerns and to manage the public rights-of-way, specifically require that such regulations be imposed in a "competitively neutral" and "nondiscriminatory" manner.[52] Subsection (e), in turn, states that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."[53]

In the final analysis, Congress has opted in favor of competition, open entry and efficiency. The significant paradigm shift reflected in the 1993 and 1996 amendments to the Communications Act has already wrought and will continue to create enormous changes in the growth and development of the telecommunications market. For the Commission to meet its ongoing obligations under Section 1 of the Communications Act, it must assess and properly factor these recent statutory amendments. Barring quick and decisive Commission intervention, State and local efforts to impose excessive and discriminatory

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51 As stated previously, while Section 601 limits the Commission's authority to rely solely upon Section 253 as a basis for preempting State and local taxation practices, Section 253 is useful in illuminating Congress' intention under Section 332 in removing State entry barriers. It is also useful to note that Section 601 is limited in scope to taxes; arguably fees and assessments not rising to the level of a tax are not exempted by Section 601.

52 47 U.S.C. § 253(b),(c).

53 47 U.S.C. § 253(e).

taxes on CMRS licensees doubtlessly will increase, as will the deleterious effect on entry, competition and efficiency.

If Congress had intended to preserve the "monopoly" status quo, i.e., where local exchange service was largely provided by one highly-regulated common carrier, with mobile carriers serving as adjuncts to (but not close substitutes for) the local exchange, then the ability of State and local governments to impose discriminatory and/or excessive taxation policies, arguably, would be less significant. That is, if mobile services were confined to functioning as "luxury" or "business" services, then the effect (and even the meaning) of a "discriminatory" or "excessive" State or local tax would be different, with less onerous developmental and competitive repercussions. But, in a competitive milieu, where services (and providers) must compete head-to-head, an excessive or discriminatory tax takes on a substantially different meaning, and can quickly create significant, severe competitive consequences. The FCC not only can, but must, recognize this significant consequence of the 1993 and 1996 amendments. Refusing to address this phenomenon because of the 1993 legislative history or the 1996 State Tax Savings provision would be akin to refusing to recognize the significant technological advancements made in the telecommunications market and their necessary effect on regulatory policy.

State and local regulatory bodies, in numerous pleadings and policy statements, have expressed significant commitment to the Commission's adoption of technology-neutral, competitor-neutral regulatory principles. This commitment to technology- and competitive- neutrality must necessarily hold with respect to principles of State and local taxation as well.

CONCLUSION

For these reasons, CTIA respectfully requests that the Commission prohibit State and local taxes (1) which impose unreasonably discriminatory or disproportionate burdens upon CMRS provider services vis-à-vis other telecommunications services and/or (2) which preclude the offering of CMRS and/or other telecommunications services.

Respectfully submitted,

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September 26, 1996

CTIA ATTACHMENT

THE RECORD DEMONSTRATES THAT STATE AND LOCAL GOVERNMENTS ARE INCREASINGLY SEEKING TO IMPOSE BURDENSOME AND DISCRIMINATORY REQUIREMENTS UPON TELECOMMUNICATIONS CARRIERS, INCLUDING CMRS, CONTRARY TO FEDERAL POLICY.

The exponential growth of telecommunications services, coupled with budgetary shortfalls, has created an environment where many states and localities have initiated plans to impose specific taxes upon telecommunications service providers. While some proposals will apply generated revenues toward programs such as E911 and distance learning,[1] others anticipate using

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[1] For example, earlier this year Florida Governor Lawton Chiles proposed a tax on cellular telephones that will generate an estimated $11.3 million annually by taxing each cellular telephone fifty cents per month. See "Florida Governor Proposes Cellular Tax to Fund 911, Distance Learning" Mobile Phone News, January 29, 1996; see also 1996 FL H.B. 2107 (proposing a $.50 surcharge on CMRS subscribers). Several other States already have legislation that taxes wireless subscribers to pay for E911, including Minnesota, Mississippi, Texas, and Washington. States that are currently considering subsidizing E911 by taxing wireless subscribers include New Hampshire, California, Massachusetts, Vermont, Maine, Illinois, and West Virginia. Mobile Phone News, May 27, 1996.

While CTIA does not object to the imposition of such taxes, they should be imposed in a nondiscriminatory manner. See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and order and Further Notice of Proposed Rulemaking in CC Docket 94-102, RM-8143, FCC 96-264, at ¶ 87 (released July 26, 1996) ("The Consensus Agreement [in which CTIA participated] proposes essentially to rely on state and local funding mechanisms, which could be in the form of public appropriations or bond issues, with or without a separate 911 subscriber line fee. The Consensus Agreement parties . . . ask the Commission to declare that state or local 911 fees or taxes reasonably related to recovery of prudently-incurred wireless system or service costs are not barred as a matter of law. They also ask the Commission to state that such fees or taxes should not discriminate between wireline and wireless carriers involved in delivery of 911 services.") (citations omitted).

telecommunications taxes as a means of generating revenues for local annual operating budgets.[2] This trend, while concentrated to date, represents a growing threat to the competitive development of telecommunications services, including CMRS.

In an effort to generate revenues for local coffers, some States have taken steps to tax wireless providers like PCS for the auction value of their licenses.[3] This tax plan has been

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2 For example, in July, 1996, Montgomery County, Maryland county officials voted 7-2 to extend a pre-existing telephone tax to CMRS customers, despite protestations by a County Executive who called the measure, "anti-business." "Montgomery County Council Overrides Veto, Taxes SMR, Paging Carriers" Land Mobile Radio News, June 28, 1996. The Montgomery County tax, which has already raised concerns within the Commission, taxes all CMRS providers 92.5 cents for each customer with a billing address in the county. Speaking at the American Mobile Telecommunications Association leadership conference in June, 1996, Michele C. Farquhar, Wireless Telecommunications Bureau Chief, expressed concerns that these local taxes may result in double taxation upon cellular subscribers. In addition, she noted that Chairman Hundt fears that the Montgomery County tax may be just the beginning of a harmful trend in State and local taxation. "FCC Expresses Concern about Trend to 'Double Tax' Wireless" Mobile Phone News, July 1, 1996. Because the county had satisfied its budgetary requirements for fiscal year 1997, "'[t]he revenue from this tax bill will go into a *rainy day fund* [emphasis added].'" Id. Quoting Russell Wilkerson, American Personal Communications.

In Fairfax County, Virginia, a proposal which would have taxed subscribers a maximum of three dollars per month in wireless access fees (to be applied to the general revenues of the county's budget) was only recently defeated after much controversy.

3 Similar problems have arisen since 1992 in Kentucky when the Kentucky Revenue Cabinet began assessing cellular companies by using a per pop valuation based on future revenue which might be generated from an FCC license. The tax levied on the cellular providers presumed a 100% penetration rate. The result has been an increase in property taxes which in some cases is as much as 3000% and there have even been cases where the taxes exceeded a provider's gross revenue for an entire tax year. Moreover, these taxes have even

implemented in Oregon, where the Department of Revenue has included in its assessment of Western PCS's property tax, the cost of Western's PCS license.[4] In West Virginia, taxation of a cellular license on a per-pop assessment (similar to the auction price of a PCS license) is the subject of an ongoing lawsuit.[5]

The targeting of telecommunications as a specialized source of local revenue generation is a formidable obstacle to the

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been imposed on wireless companies that have not yet begun operation and that do not have any tangible property in the State. See Comments of United States Cellular Corporation in File No. WTB/POL 96-3, at 6-7 (filed August 30, 1996).

4 Western PCS has filed a Petition for Preemption and Request for Declaratory Ruling: In the Matter of Western PCS I Corporation, Petition for Preemption of the Oregon Department of Revenue Notice of Proposed Assessment, File No. WTB/POL 96-3; see FCC Public Notice, "Commission Seeks Comment on Petition for Preemption and Motion for Declaratory Ruling Filed By Western PCS I Corporation," File No. WTB/POL 96-3, DA 96-1211 (rel. July 30, 1996). CTIA filed comments in support of Western PCS's petition.

5 Currently pending before the Supreme Court of Appeals of West Virginia is an appeal requesting the Court to overturn a lower court's decision which found that an FCC license is not property subject to *ad valorem* taxation by the State. See Ohio Cellular RSV Limited Partnership v. Board of Public Works of the State of West Virginia, No. 23294 (Supreme Court of Appeals of WV). In this case, a West Virginia court removed the license from the assessed value of Ohio Cellular's property thus lowering the property tax value from $1,585,600 to $477,273. The West Virginia taxing authorities are challenging that decision.

Also, the Kentucky House of Representatives has passed a provision which imposes an annual *ad valorem* tax of 1.5 cents for every $100.00 of value of a wireless telecommunications provider. Explicitly included in the value of wireless carriers are "licenses or permits issued by the Federal Communications Commission." 1996 KY H.B. 125. The Bill has been referred to the Senate Committee on Appropriations and Revenue. Revenues generated by the tax will be utilized for general State purposes.

effective roll-out of a competitive telecommunications infrastructure. This is especially problematic in the case of disparate tax treatment some States impose upon telecommunications companies based on the nature of their technology.[6] As States attempt to bolster their revenues by specifically taxing telecommunications companies, they must also be strictly held to the provisions and intentions of the Communications Act, which prevent excessive and discriminatory State and local taxation policies.[7]

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6 Earlier this year, a Texas court struck down a telecommunications utilities assessment that differentiated between wireless and wireline carriers by imposing greater taxes upon wireless companies. The court concluded that the law violated the "equal and uniform taxation" clause of the Texas Constitution. <u>Paging Companies for a Fair Assessment v. John Sharp, Comptroller of Public Accounts for the State of Texas, et al.</u>, No. 95-15783, Dist. Ct. Travis Co., Texas (February 5, 1996). While the court's decision promotes competition on an equal footing, the actions of the Texas legislature cannot go unnoticed.

Similarly, West Virginia's *ad valorem* tax on FCC licenses (discussed above) inevitably thrusts upon cellular carriers in West Virginia a significant tax burden, one which is not imposed on cellular carriers in other States. The *ad valorem* tax, as currently applied, apparently causes considerable disparate and discriminatory treatment between carriers in the State of West Virginia. Depending on when and the under what circumstances the cellular license was obtained or purchased, the tax imposed on one cellular provider could be significantly different than the tax imposed on another, as the value of any transferred license is taxed upon transfer. *Amicus Curiae* Brief of Tri-State Cellular Partnership (filed May 6, 1996) in <u>Ohio Cellular v. Board of Public Works</u> at 10.

7 Another example of different taxes for different technologies is a Connecticut carrier assessment to fund administrative expenses of the Connecticut Sitting Council which is only imposed upon cellular carriers and not PCS or SMRS.